Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-298

DELORES J. RUSSELL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FERRIS F. BOOTHE
BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS
3100 First National Bank Tower
Portland, Oregon 97201

Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

DOLORES J. RUSSELL, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on March 9, 1979.

OPINIONS BELOW

The opinion of the District Court for the District of Oregon is unreported. It is printed in Appendix B, beginning on page 38. The opinion of the Court of Appeals reversing the judgment of the District Court is reported at 592 F2d 1069 (1979). It is printed in Appendix A, beginning on page 27.

JURISDICTION

The judgment of the Court of Appeals was made and entered on March 9, 1979, a copy of which is printed in Appendix C. A Motion for Order granting enlargment of time for rehearing was

filed on March 14, 1979 and granted on March 21, 1979. A timely Petition for Rehearing and Suggestion of Rehearing in Banc was filed on April 26, 1979. The Petition was denied by an Order of the Court of Appeals dated June 1, 1979, a copy of which is attached as Appendix D.

This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where a taxpayer has sued in District Court for a refund of federal taxes, and the Commissioner of Internal Revenue forces a taxpayer into the Tax Court by asserting a time-barred or otherwise baseless or legally invalid deficiency against the taxpayer for the same tax year, and the Tax Court dismisses the deficiency, may the taxpayer return to District Court to pursue her tax refund

claim?

STATUTE INVOLVED

26 U.S.C. §7422(e) is reported in full in Appendix E, page 53. It provides in part:

> "***If the taxpayer files a Petition with the Tax Court the District Court shall lose jurisdiction of the taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund..."

STATEMENT OF THE CASE

On October 18, 1966, a United States Income Tax Return for the 1965 taxable year was filed for Petitioner. On April 11, 1969, she made a claim of refund. The Internal Revenue Service took no action on the claim. On February 1, 1973, she instituted her District Court refund suit to recover an alleged overpayment of $65,492.50. On April 10, 1973, after the government had filed an

Answer in this suit, and some four years after the Statute of Limitations had run, the Internal Revenue Service issued a statutory notice of deficiency for the taxable year 1965 in the net amount of $50,433.19. On July 5, 1973, the taxpayer, who was then insolvent, filed in the Tax Court a Petition for Redetermination of the Deficiency. On October 15, 1973, the District Court dismissed her case without prejudice to the parties. When the government notified the taxpayer that the October 1966 tax return for the year 1965 had been discovered, the taxpayer moved in District Court for reopening of the case. The government stipulated to such reinstatement.

The taxpayer then moved the Tax Court to dismiss the notice of deficiency with prejudice, but to dismiss the taxpayer's petition without prejudice.

The goverment admitted that the statutory notice had been mailed to the taxpayer some four years after the Statute of Limitations had run. The Tax Court dismissed both motions, holding simply that there was no deficiency. Thereafter, the District Court vacated its Order of Dismissal and reinstated taxpayer's suit as an active case. On September 30, 1976, the District Court, after a trial on the merits, awarded taxpayer $64,600.95 plus interest from April 15, 1966. On March 9, 1979, the Court of Appeals reversed the District Court and held that the District Court had lost jurisdiction because the taxpayer filed her Petition in the Tax Court.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals in this case is in conflict with decisions of other Courts of Appeals.

The Court below held that:

> "Under 26 U.S.C.§7422 (e), the District Court lost jurisdiction when the taxpayer filed her Petition with the Tax Court to determine the deficiency in her income tax for the year 1965 asserted by the Commissioner in his notice of deficiency." 592 F2d 1071.

Both the Fourth Circuit and the Fifth Circuit, however, have held that the mere filing of a Petition in the Tax Court does not in itself operate to remove jurisdiction from the District Court. Only a decision on the merits by the Tax Court is sufficient to remove jurisdiction from the District Court.

In United States v. Joe Graham Post No. 119, American Legion, 340 F2d 474 (CA5, 1965), the taxpayer filed a refund suit in District Court for the fiscal year July 1, 1960 through June 30, 1961. The Commissioner asserted a deficiency against taxpayer for the calendar year

January 1, 1960 through December 31, 1960. The taxpayer filed a Petition with the Tax Court requesting a determination that the appropriate taxable year was the fiscal year. The Court of Appeals for the Fifth Circuit held that taxpayer's Petition to the Tax Court operated to give the Tax Court exclusive jurisdiction over the question of the appropriate taxable year, but once this "threshold issue" was decided (if favorable to the taxpayer) the District Court retained jurisdiction over the refund suit. The Fifth Circuit thus held that §7422(e) requires only that the same issues cannot be decided by both the Tax Court and the District Court.

In Handshoe v. Commissioner, 252 F2d 328 (CA4, 1958), the taxpayers had instituted an action for refund of taxes for the year 1954 in the District

Court for the District of Maryland. Thereafter, the Commissioner issued a Notice of Deficiency covering the years of 1954 and 1955. The taxpayers then filed a Petition in the Tax Court, whereupon the Commissioner moved to dismiss the action pending in the District Court. The District Court denied the motion, however, and simply held further proceedings in abeyance pending further action in the Tax Court.

Taxpayers then moved in the Tax Court to withdraw their Petition with respect to the year 1954. The Tax Court, apparently believing that taxpayers were unable to return to District Court if the Petition in Tax Court were dismissed, denied the motion. An appeal to the Fourth Circuit was then brought from the order denying the motion. The Court dismissed on the ground that the order

was interlocutory, but went on to state that the dismissal would be without prejudice to the right of the taxpayers to renew their motion in Tax Court if they saw fit to do so, and without prejudice to the power of the Tax Court to grant the motion, if renewed. The Court of Appeals described the situation in the following terms (at 329):

> "The denial of the Motion by the Tax Court was evidently based upon the belief that petitioner would be without remedy if their motion were allowed. We do not think, however, this would necessarily result. See 26 U.S.§7422(d) and 26 U.S.§7422(e). The action in the District Court was filed before the petition to the Tax Court and was still pending. If petitioners had been allowed to withdraw their petition to the Tax Court insofar as it related to the year 1954, on the ground that through inadvertence and ignorance of the law it had been filed with relation to that year, we see no reason why the Tax Court would be required to proceed under the Statute as upon a dismissal nor why the jurisdiction with respect

to the matter should be held to have been lost. Certainly neither result should follow, if the order allowing withdrawal were to provide that it was entered without prejudice to the right of the petitioner to proceed in the action pending in the District Court." (emphasis added).

It is important to note that it is precisely the interpretation of §7422(e) favored by the Court below which was followed by the Tax Court in Handshoe and squarely rejected by the Fourth Circuit. Petitioner in the instant case, the Tax Court and the District Court have all proceeded on the assumption that the Court of Appeals for the Fourth Circuit correctly interpreted §7422(e) to permit the District Court to retain jurisdiction over a suit for refund where the Tax Court has made no decision on the merits of the taxpayer's suit for refund. The only distinction between Handshoe and the instant case is that here the government

erroneously asserted a time-barred deficiency against petitioner whereas there the petitioner mistakenly filed a petition which he later sought to withdraw.

The holding of the court below thus stands in direct conflict with the holding of previous Courts of Appeals and presents a new instruction to the Tax Court and the District Court on the proper procedure when a petition is filed in Tax Court while a refund suit is pending in District Court. Under the rule of the Fifth Circuit in Joe Graham, the Tax Court may decide a "threshold issue" like the appropriate tax year, without depriving the District Court of jurisdiction to decide the merits of the refund claim. Under the rule of the Fourth Circuit in Handshoe, a mistake by taxpayer in filing a petition in the Tax Court (not to mention one by the government in filing a

deficiency claim!) can be corrected by the Tax Court without depriving the District Court of jurisdiction over a refund suit. The Ninth Circuit, however, has held below that any Petition filed in the Tax Court operates to deprive the District Court of any jurisdiction over a refund suit for the same year, and that the Tax Court must decide all issues on the merits of the tax year involved.

II. The Decision of the Court of Appeals works substantial Injustice on Taxpayers who, like Petitioner, are Victims of Government Error.

The language of 26 U.S.C.§7422(e) casts doubt on the interpretation given it by the Court below.

The full text of §7422(e) is reprinted in Appendix E at page 53. As noted by Judge Grant, concurring below, the intent of §7422(e) is two-fold:

> "(1) to give jurisdiction over the cause of action to only one court, and thereby prevent relitigation of identical issues, and (2) to give the taxpayer the choice of which court shall have jurisdiction. This choice was intended to be given to the taxpayer rather than the government." 592 F2d 1069 (1979)(Grant, J. concurring).

The court below has interpreted this amendment to mean that the act of filing the petition is sufficient to deprive the District Court of jurisdiction. Not only have two Circuits disagreed with this interpretation, but the language of the statute itself appears to contemplate a different approach. Had the Congress intended to make the filing of a petition definitive, the statute would have read,

> "If the taxpayer files a petition with the Tax Court, the District Court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit."

Instead, the statute adds the following language:

> "...the District Court...shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund."

Two qualifications unexplained by the Court below were added by the Congress. First, the Congress added the words "to whatever extent," apparently intending that, where some limited issue was addressed by the Tax Court, that issue would be res judicata in the refund suit in District Court, but the merits of the taxpayer's claim, if not reached in the Tax Court proceeding, might still be considered. Second, the Congress specified that the jurisdiction of the Tax Court must be "of the subject matter" of the taxpayer's suit. Conceding that the liability for the tax year is an indivisible issue, so that once the Tax Court considers one question of taxes owing, it must consider them all, the

"subject matter" of the tax year must be addressed. Thus the Fifth Circuit's holding in Joe Graham that a "threshold issue," like the appropriate taxable year, can be decided by the Tax Court without depriving the District Court of jurisdiction over a refund suit.

The language of the Senate Report cited by Judge Grant below, appears on the surface to sustain the interpretation of the Court below:

> "The taxpayer, by filing a petition in the Tax Court, would cause that Court to have sole jurisdiction...".

S. Rep. No. 1622, 83d Cong. 2d Sess., pp. 149, 610-611 (3 U.S. Code Cong. Admin. News, pp. 4621, 5261 (1954)). However, when read in the context of the purpose of the amendment--to avoid litigation of the same issues in two courts--and in light of the statutory language, this statement must be interpreted to mean that

a petition in the Tax Court, and litigation of the case on the merits, would cause the Tax Court to have sole jurisdiction. Surely the Court of Appeals for the Fourth Circuit was correct in concluding in Handshoe, supra, that the mere filing of a petition, where based on mistake, was not intended by the Congress in itself to deprive the District Court of jurisdiction.

> "Courts should not hold themselves powerless to relieve against the results of ignorance and inadvertence in matters of procedure." 252 F2d 328, 330.

Petitioner agrees that only one trial may be had of the merits of her case. But, petitioner submits that where the Tax Court acts only to dismiss a deficiency notice because of an obvious government error, the taxpayer may return to District Court to seek a refund for the same tax year.

III. The Opinion Below Allows the Government's Error to Deprive the Taxpayer of the Choice of Forum Intended by Congress

As noted above, Congress intended to give the choice of forum - Tax Court or District Court - to the taxpayer. The only requirement for a suit in District Court is that the taxpayer must have paid the assessment made by the Commissioner, in full. In Flora v. United States, 362 U.S. 145 (1957), relied upon by the Court below, this court held that a taxpayer could not pay only part of an asserted deficiency and then sue in District Court for a refund of that amount. To hold otherwise, reasoned the Court, might permit the taxpayer to,

> "...sue for a small portion of the tax in [District Court] while at the same time protecting the balance from distraint by invoking the protection of the Tax Court procedure." 362 U.S. 145, 165.

The Court naturally reached the conclusion

quoted by the Court below, that,

> "...under §7422(e) such a claimant is given the option of pursuing his suit in the District Court or in the Tax Court, but he cannot litigate in both." 362 U.S. 145, 166 (Supreme Court's emphasis).

Petitioner concedes that the taxpayer must make a choice of forums; he cannot maintain one action in Tax Court to forestall assessment, and another action in District Court to obtain a refund. But, here the petitioner made an election of forum, the District Court, and would never have appeared in Tax Court but for the government's error in asserting a deficiency for the 1965 tax year. The Court below attempts to equate Flora with the instant case. Had the Commissioner asserted a valid deficiency against the petitioner, or at least a colorable claim which had to be argued on the merits, certainly the Tax Court would have assumed

full jurisdiction not only over the question of the deficiency, but the issue of the claim for refund as well. But, where as here, the government's claim is not colorable, where it is based on a clear error of which it either knew or should have known, then the Tax Court may view its dismissal of the government's deficiency notice not as an adjudication of the appropriate tax in 1965, but simply as a return of the parties to the status quo ante. To hold otherwise, as the Court below has done, is to permit government error to deprive the taxpayer of access to the District Court.

IV. The Ninth Circuit Interpretation of the Equivocal Language of 26 U.S.C. §7422(e) is Grossly Unfair to the Taxpayer

While fairness to the taxpayer is not necessarily the ultimate criterion in the interpretation of our tax laws, it should be considered if we are to have

effective tax laws which not only require taxpayers to pay their share of the burdens of our government, but should also protect their rights.

The taxpayer filed her 1965 income tax return on October 18, 1966, in Brooklyn, New York. Somehow, the return was lost or misplaced. On April 11, 1969, she filed an amended return which was a claim for refund. The Internal Revenue Service did nothing for almost four years while the Justice Department Strike Force was using her services as a witness against the Ianniellos in some criminal prosecutions. Finally, despairing of getting action, on February 1, 1973, she filed her refund suit in the District Court. On April 10, 1973, almost four years after the statute of limitations had run against the Internal Revenue Service, the Internal Revenue Service issued its statutory notice of

deficiency for $50,433.19 plus interest. The taxpayer by then was insolvent and could not pay it.

The Ninth Circuit treated this situation very casually (App 32) with the assertion that the taxpayer had a choice; pay the deficiency assessment and stay in the District Court, or go to the Tax Court. This is not a choice when the taxpayer is insolvent. However unfair, it is a result which the law requires when the taxpayer is without sufficient funds and desires to contest a deficiency assessment, and would seem to violate the due process clause of the Fifth Amendment. This is not fair, but it is the law. But when the language of the law is equivocal, the taxpayer is innocent of mistake and the government is totally in error, ab initio, (and an error confirmed by the decision on the merits of the District Court) in its filing of the

deficiency assessment, 26 U.S.C. §7422(e) should not be given the unjust, unrealistic and overly technical interpretation of the Ninth Circuit. The District Court in this case and the Fourth Circuit in Handshoe, recognized the problem and went on the side of fair play. The Ninth Circuit did not.

At the outset, the law is simple. If the taxpayer is fully paid and wants to claim a refund, the taxpayer has the option of proceeding in the District Court or the Tax Court. If the taxpayer received a deficiency assessment, the taxpayer seeking to contest the assessment must go to the Tax Court unless he is willing to pay the deficiency, and if he does, he retains his option.

26 U.S.C. §7422(e) purports to deal with the situation where the taxpayer has initiated a refund claim in the District

Court and then the government asserts a deficiency claim. It provides that the District Court loses jurisdiction to the extent it has been acquired by the Tax Court; when in fact, the deficiency assessment was invalid, ab initio. What the taxpayer did in the Tax Court should really have been treated as an appearance in the nature of a special appearance to contest Tax Court jurisdiction since its jurisdiction was improper. Taxpayer should not be penalized, as the taxpayer was in this case. The government is in error and the taxpayer is innocent. Can it be said the Tax Court truly got jurisdiction? If it did have jurisdiction, it had jurisdiction only to the extent necessary to declare that the government's deficiency claim was invalid at the outset. The District Court concluded that it had no difficulty in upholding the taxpayer's

refund claim on the merits (App 45), a result which negates the government's deficiency claim on the merits, in addition to its being barred, ab initio, by the statute of limitations.

The taxpayer did all she could do except to pay a completely unjust and improper deficiency claim (when such payment for her was impossible), and under the Ninth Circuit decision, she comes up empty after 13 years of effort to obtain a justified return. An equivocal law should not be interpreted in a way to reach this result. Such unfairness does violence to our entire tax structure and to our concepts of judicial fairness. Taxpayer has been deprived of her rights without due process of law under the Fifth Amendment. Procedural due process, it is true, is generally invoked only in criminal matters, but this jurisdictional statute

has been interpreted in a punitive manner to cause irremediable injury to an innocent taxpayer.

Our courts have applied an estoppel against the government in situations no more egregious than this one.

Schuster v. Commissioner of Internal Revenue, 312 F.2d 311 (CA, 9th, 1962);

Sun Il Yoo v. Immigration and Naturalization Service, 534 F.2d 1325 (CA, 9th, 1976).

The Ninth Circuit result is wrong as a matter of statutory interpretation. It is grievously wrong in its fairness to taxpayer and in its denial of her rights against the government. It should be reviewed and the interpretation of the statute clarified to protect taxpayers from the over-reaching potential of the Internal Revenue Service under the Ninth Circuit interpretation, to be able

to force every refund claimant into the Tax Court by filing a deficiency claim which the claimant is not able to pay.

CONCLUSION

The Court of Appeals for the Ninth Circuit erred in its interpretation of 26 U.S.C. §7622(e). The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Black,Kendall,Tremaine,
Boothe & Higgins

_____
Ferris F. Boothe
of Attorneys for
Petitioner

APPENDIX 'A'

Dolores J. RUSSELL, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 77-1136.

United States Court of Appeals, Ninth Circuit.

March 9, 1979.

Ferris F. Boothe (argued), of Black, Kendall, Tremaine, Boothe & Higgins, Portland, Or., for plaintiff-appellee.

Leonard Henzke, Atty. (argued), of Dept. of Justice, Washington, D. C., for defendant-appellant.

Appeal from the United States District Court for the District of Oregon.

Before DUNIWAY and CHOY, Circuit Judges, and GRANT,* District Judge.

DUNIWAY, Circuit Judge:

This appeal presents a question as to the jurisdiction of the District Court over an action for a refund of income tax when the Commissioner of Internal Revenue, after the taxpayer filed her claim for refund, and after she filed her action for refund in the District Court, asserted a deficiency and the taxpayer then petitioned the Tax Court for a redetermination. The District Court held that it retained jurisdiction over the taxpayer's claim for refund, and gave judg-

* The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

ment for the taxpayer. The government appeals. We reverse.

I. *The Facts.*

The facts make interesting reading. The taxpayer (plaintiff-appellee), a former beauty contest winner, had been the recipient of gifts valued in excess of one million dollars which had been bestowed on her by Harold Kuhns, the founder and board chairman of Xerox Corporation. While accepting his favors, taxpayer became romantically involved with Allie Ianniello, reputed to be a member of the New York Cosa Nostra. Allie, upon discovering the wealth of the taxpayer, and with the help of his brother and their attorney, proceeded to swindle the taxpayer out of her money through investment ventures in "businesses" owned and operated by the Ianniellos. These investment ventures occurred in the 1965 tax year.

The taxpayer's involvement with Allie Ianniello became more coercive than romantic and, fearing for her life, the taxpayer left the state of New York. Thereafter, with the help of an attorney, she attempted to recoup her losses. Recovery efforts resulted in minimum returns at best. By 1969, four years after these 1965 investments, the taxpayer, failing to recoup the major part of her investments, located another attorney who threatened the Ianniellos with legal action unless the sum of the investments were repaid to the taxpayer.

In that same year, 1969, the taxpayer filed a claim for refund of income taxes for the year 1965. The basis for the claim was that in 1965 she had suffered a theft loss within the meaning of 26 U.S.C. § 165(e). On February 1, 1973, she filed this action for a refund of approximately $65,000 al-

leged to have been overpaid by reason of the theft loss. On April 10, 1973, the Commissioner issued a statutory notice of deficiency for 1965, in the net amount of approximately $50,000. The taxpayer timely petitioned the Tax Court for a redetermination of the deficiency and, pending the Tax Court's redetermination, the District Court dismissed the taxpayer's suit for a refund.

The Tax Court held that the government was precluded by the statute of limitations from asserting a deficiency against the taxpayer and held that there was no deficiency. The taxpayer did not assert her claim of a 1965 theft loss before the Tax Court. She asked that court not to decide it. The Commissioner asked the Tax Court to decide the question, pointing out that the Tax Court did have jurisdiction to do so. The Tax Court's decision does not mention the question.

After the judgment of the Tax Court, the District Court reinstated the taxpayer's refund suit, holding that the Tax Court had acquired jurisdiction only to the extent of dismissing the government's deficiency claim on the basis of the bar of the statute of limitations and that, therefore, the District Court was not ousted of jurisdiction over the remaining issues. The District Court denied the government's motion to dismiss in which it was argued that under 26 U.S.C. § 7422(e), once the taxpayer had petitioned the Tax Court for redetermination of deficiency, the Tax Court also assumed complete jurisdiction over the taxpayer's tax liability for the year 1965. In addition to supporting the District Court's decision on jurisdiction, taxpayer argues, *inter alia*, that the government should be estopped to deny what it had alleged in its case against the Ianniellos.

The District Court held that the taxes paid for 1965 were recoverable by taxpayer as a theft loss deduction for that year pursuant to 16 U.S.C. § 165(e).

II. *The Jurisdiction of the District Court.*

[1] The District Court did not have jurisdiction. Under 26 U.S.C. § 7422(e), the District Court lost jurisdiction when the taxpayer filed her petition with the Tax Court to redetermine the deficiency in her income tax for the year 1965 asserted by the Commissioner in his notice of deficiency. That is what § 7422(e) requires. Section 7422(e) says that in such a case, "the district court . . . shall lose jurisdiction of the taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of [the] taxpayer's suit for refund."

The key principle is stated by the Court in *Flora v. United States*, 1957, 362 U.S. 145, 166, 80 S.Ct. 630, 641, 4 L.Ed.2d 623.

> Section 7422(e) of the 1954 Internal Revenue Code makes it apparent that Congress has assumed these problems [of dual jurisdiction] are nonexistent except in the rare case where the taxpayer brings suit in a District Court and the Commissioner then notifies him of an additional deficiency. Under § 7422(e) such a claimant is given the option of pursuing his suit in the District Court or in the Tax Court, *but he cannot litigate in both.* (Emphasis the Court's.)

The taxpayer exercised her option by pursuing her suit in the Tax Court.

[2] The Tax Court acquired jurisdiction to decide, not only whether the Commissioner's assertion of a deficiency was correct, but also whether Russell's claim that she had overpaid was correct. This is what 26 U.S.C. § 6512(b) expressly provides:

> "Overpayment determined by the Tax Court.—(1) Jurisdiction to determine.—If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, . . . in respect of which the Secretary . . . determined the deficiency . . . the Tax Court shall have jurisdiction to determine the amount of such overpayment . . ." We cannot imagine clearer language.

In such a case, the Tax Court's decision is *res judicata* as to the year in question. *Commissioner of Internal Revenue v. Sunnen*, 1948, 333 U.S. 591, 597–98, 68 S.Ct. 715, 719, 92 L.Ed. 898:

> It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.
>
> • • • • • •

> Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.

There can be no question that when the taxpayer petitioned the Tax Court to redetermine the asserted deficiency, the Tax Court acquired jurisdiction to decide the entire gamut of possible issues that controlled the determination of the amount of tax liability for the year in question. A party cannot, in such a case, by failing to raise an issue, or by asking the court not to consider it, escape the *res judicata* effect of the decision. This is hornbook law.

III. *Equitable Issues.*

We have held that there is an exception to the foregoing well established rule, as applied to the Tax Court, because the Tax Court has no equity jurisdiction. *Morse v. United States,* 9 Cir., 1974, 494 F.2d 876. *See also, Feistman v. C.I.R.,* 9 Cir., 1978, 587 F.2d 941.

[3] The taxpayer argues, without much conviction, that she should be able to assert her claim in the District Court because she was forced into the Tax Court by reason of her inability to pay the asserted deficiency. This claim was answered by the Court in *Flora, supra,* 362 U.S. at 175, 80 S.Ct. at 646:

> A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore

> entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent.

[4] The taxpayer's other contention is equally without merit. When she cooperated with the government, it was in her interest to do so. She makes no claim that any government official told her that her cooperation would gain any tax benefits for her. The most that she claims is that the government has taken the position, in relation to the Ianniellos' tax liability, that they swindled her out of her money in 1965. The government does not dispute this. Its position, as to the taxpayer, is that she did not determine that she could not get her money back until later years. Indeed she did get some of it back after 1965. The government's theory is that, as to her, the theft loss deduction is to be made, not when the Ianniellos got the money, but when it became apparent that she could not get it back—that this is when the "loss" to which the law refers was ascertained. This is not, as taxpayer argues, in conflict with the government's position vis a vis the Ianniellos. It may or not be good law, but it is not the kind of behavior by the government that appeared in the cases on which Russell relies. *See Schuster v. C.I.R.,* 9 Cir., 1962, 312 F.2d 311; *Sun Il Yoo v. I. & N.S.,* 9 Cir., 1976, 534 F.2d 1325.

We conclude that the District Court lost jurisdiction when the taxpayer filed her petition with the Tax Court, and did not get it back when the Tax Court decided her case.

Reversed, with directions to vacate the judgment and dismiss the action.

GRANT, District Judge, concurring:

In concurring with the majority opinion, I wish, however, to comment on three areas: (1) the legislative history of 26 U.S.C. § 7422(e); (2) a potentially misleading case, and (3) 26 U.S.C. § 7459(b).

I—Both the Senate and House Reports [1] on Section 7422(e) evidence two policies: (1) to give jurisdiction over the cause of action to only one court, and thereby prevent relitigation of identical issues, and (2) to give the taxpayer the choice of which court shall have jurisdiction. This choice was intended to be given to the taxpayer rather than the government. *Pfeiffer Company v. United States*, 518 F.2d 124, 129 (8th Cir. 1975). In the case at bar, even if taxpayer would have paid the deficiency in order to preserve district court jurisdiction over the refund, the *Pfeiffer* case indicates that again her choice of forums to litigate the deficiency need not be recognized by the government. Under *Pfeiffer*, even if taxpayer pays the deficiency, the government "may —but seemingly is not required to—bring a counterclaim" [2] in the district court. See

1. Both the House and Senate Reports read in part:

> . . . The result under subsection (e) is to give jurisdiction over the cause of action to only 1 court (2 courts may acquire jurisdiction under existing law), and to give the taxpayer the choice of which court shall have jurisdiction. The taxpayer, by filing a petition in the Tax Court, would cause that court to have sole jurisdiction, or, *by failing to file a petition in the Tax Court, would cause the district court or the Court of Claims to have sole jurisdiction* . . . (Emphasis supplied.)

H.Rep.No.1337, 83d Cong., 2d Sess., p. '09 (3 U.S.Code Cong. & Admin.News, pp. 4017, 4136 (1954)); S.Rep.No.1622, 83d Cong. 2d Sess., pp. 149, 610–611 (3 U.S.Code Cong. & Admin. News, pp. 4621, 4782–4783, 5261 (1954)).

2. *Pfeiffer* at p. 128 quoting *Flora v. U. S.*, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960).

also *Caleshu v. United States*, 570 F.2d 711 (8th Cir. 1978). This view of the law might work to defeat the Congressional purpose of choice of forum. See Judge Heaney's concurring opinion in *Pfeiffer*.

II—To prevent a recurrence of the taxpayer's present plight (of failing to make a timely appeal of her Tax Court decision in reliance upon the mistaken assumption that the district court had continuing jurisdiction), I would stress that, as the law stands now, all issues that can be raised before the Tax Court must be raised, and that once the Tax Court decision is final, there is no further recourse to a district court regarding non-equitable issues. Plaintiff has cited the case of *Falese v. United States*, 26 A.F.T. R.2d 70–5940 (N.D.Ill.1970), for the proposition that the issues comprising the subject matter of a refund suit are divisible and that when one issue is presented to the Tax Court, that fact does not mean that all other issues from that year must necessarily follow the first issue into the Tax Court's jurisdiction. I would warn that such has proved to be a losing proposition.

III—Finally, plaintiff's protest over the application of Section 7422(e)'s ban on continuing district court jurisdiction can be appreciated here because of the fact that the Tax Court apparently did not consider anything beyond the threshold barrier of the statute of limitations. The pleadings before the Tax Court show that what actually happened was that the taxpayer requested that the government's claim of deficiency be dismissed with prejudice because of the statute of limitations, and that the taxpayer's refund claim be dismissed without prejudice so that the pending district court refund suit could proceed. The government opposed both motions for dismissal and reminded the Tax Court that it had jurisdiction to determine an overpay-

ment and that the government was ready to proceed to trial on that issue. The Tax Court, however, thereupon rendered the following decision:

DECISION

At the hearing in this case held at Portland, Oregon, on May 9, 1974, the parties admitted that the statutory notice was not mailed to the petitioner within the time prescribed by law. Petitioner has pleaded the statute of limitations. Accordingly, it is hereby

DECIDED: That there is no deficiency in income tax or additions to tax under section 6651 of the Internal Revenue Code due from the petitioner for the taxable year ended December 31, 1965.

(signed) William H. Quealy
Judge

This all too brief entry by the Tax Court resolved the deficiency issue on the threshold barrier of the statute of limitations, but did not address the overpayment issue. Therefore, it is not clear whether the merits of either issue were ever litigated before the Tax Court. Apparently they were not.

Section 7459(b) of 26 U.S.C. prescribes the duty of a Tax Court in rendering a decision:

> (b) Inclusion of findings of fact or opinions in report.—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions.

Section 7459(b) appears to impose an affirmative duty on the Tax Court to put in writing all of its findings of fact and opinions. Furthermore, courts have held that

the Tax Court is required to resolve all material issues properly raised before it and to make appropriate fact-findings upon such issues. *Transport Manufacturing & Equipment Co. of Del. v. C.I.R.*, 374 F.2d 173 (8th Cir. 1967). Because of this duty to make written findings, an inference can be made that because the Tax Court's decision included no findings of fact regarding overpayment or theft deductions, the Tax Court did not consider that those issues were properly before it. If this is what actually occurred, then it would suggest that the Tax Court erred. When the petition for redetermination of deficiency was filed with the Tax Court, both the issue of deficiency, as well as any overpayment issue, were properly before the Tax Court and, regardless of the pending refund action, the Tax Court should have made findings regarding the computations basic to determinations of those issues. Unfortunately for plaintiff, however, the case at bar is an appeal from the judgment of the District Court for the District of Oregon, not an appeal from the 1974 decision of the Tax Court.

APPENDIX B

"OPINION, dated September 30, 1976, by The Honorable Otto R. Skopil, Jr., in Case No. 73-74, entitled 'DOLORES J. RUSSELL, Plaintiff v. UNITED STATES OF AMERICA, Defendant.'

I.
INTRODUCTION

This is an action by plaintiff, as taxpayer, to recover a refund for federal income taxes that she claims to have overpaid for the year 1965. Plaintiff claims that she incurred losses in 1965 based on fraudulent misrepresentations, which were not reported in her 1965 tax return. The parties agree that both plaintiff's tax refund claim as well as this suit were timely filed.

II.
ISSUES

This case involves two central issues: does this court have jurisdiction, and can the plaintiff properly claim these losses under I.R.C. Section 165?[1]

III.
JURISDICTION

On February 1, 1973, plaintiff instituted this action to recover an alleged overpayment of $65,492.50. On April 10, 1973, after the defendant had filed an answer, the Internal Revenue Service issued a statutory notice of deficiency for the taxable year 1965 in the amount of $105,712.29. A statement attached to the notice of deficiency indicated that plaintiff owed $50,433.19 after allowing an appropriate credit. On July 5, 1973,

plaintiff filed in the tax court a petition for redetermination of the deficiency. On October 15, 1973, this court dismissed the district court case without prejudice to the parties. The plaintiff, in her petition for redetermination in the tax court, plead the statute of limitations as a defense to the government's claim. Under Section 6501(a) of the IRC it is stated: 'Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed...' IRS had assumed that plaintiff had not filed for the 1965 taxable year until 1969. Based on this assumption, IRS sought and obtained from plaintiff on November 19, 1971, a consent to an extension of the period of limitations. Contrary to the assumption of IRS, the plaintiff had filed her income tax return for 1965 on October 18, 1966. The consent was obtained beyond the three-year statute of limitations. It was of no effect. Thus the deficiency asserted on April 10, 1973, was no longer timely. The tax court so held:

> 'At the hearing in this case held at Portland, Oregon, on May 9, 1974, the parties admitted that the statutory notice was not mailed to the petitioner within the time prescribed by law. Petitioner has pleaded the statute of limitations. Accordingly, it is hereby
>
> 'DECIDED: That there is no deficiency in income tax or additions to tax under section 6651 of the Internal Revenue Code due from the petitioner for the taxable year ended December 31, 1965.''

Thereafter this court on May 3, 1974, vacated its order of October 15, 1973, and reinstated plaintiff's suit as an active case.

On December 4, 1974, defendant filed a motion to dismiss, arguing that this court no longer had jurisdiction. Oral argument was heard on April 22, 1975. Judge Solomon denied the motion. No formal order was entered.

It is the government's position that once a notice of deficiency is mailed, the district court forever loses jurisdiction of all tax liability issues for the entire tax year in question if the taxpayer petitions the tax court for a redetermination of the asserted deficiency. In support of its position, the government cites Section 7422(e)[2] of the IRC of 1954, which states is relevant part:

> 'If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund.'

The plaintiff was unable to pay the large deficiency claim. She had to file a petition for redetermination with the tax court.

Defendant argues that the filing of a petition for redetermination of deficiency in the tax court forever deprives this court of jurisdiction to determine the question of refund under Section 7422(e). Plaintiff, on the other hand, argues that Section 7422(e) was merely intended to prohibit the operation of concurrent

jurisdiction by two courts at the same time. Thus plaintiff argues that 7422(e) operates as a stay on district court jurisdiction only while tax court hearings are in progress. I find neither interpretation of Section 7422(e) satisfactory.

The legislative history behind this section, as well as cases interpreting it, make it clear that finality is the end sought. The taxpayer is given a choice of forums. Once jurisdiction is lost to the tax court, it is lost forever.[3] To this extent the plaintiff's jurisdictional argument is without legal merit. This does not mean, however, that the filing of a petition for redetermination with the tax court always deprives the district court of jurisdiction over all tax issues arising out of the tax year in question. The statute states that jurisdiction is lost 'to whatever extent jurisdiction is acquired by the tax court...' The question remains: To what extent did the tax court acquire jurisdiction?[4]

I fail to find a single case directly on point. A close analogy can be drawn, however, between this problem before the tax court and Rule 13(a)[5] compulsory counterclaims. The general rule is that one who has a counterclaim arising out of the same transaction or occurrence and does not advance it will be thereafter precluded from asserting it. An exception has been recognized, however, where the plaintiff's claim has been dismissed before trial. In these cases courts have found that the counterclaimant was not barred by the prior adjudication. Lawhorn v. Atlantic Refining Co., 299 F.2d 353 (5th Cir. 1962); Seligson v. Plum Tree, 361 F. Supp. 748 (E.D. Pa. 1973). In Lawhorn the court refused to dismiss a claim which could have

been asserted in a prior suit on a counterclaim when in that prior suit the counterclaimant moved for and was granted dismissal for failure to state a claim upon which relief could be granted. In explaining its decision, the court stated:

> 'Taking the Rules at face value, it is clear that a plaintiff must have a claim before a defendant is required to assert a compulsory counterclaim. A counterclaim must be pressed only when it is related to the '***subject matter of the opposing party's claim***.' F.R.Civ.P. 13(a)(emphasis added). That is what makes it a counterclaim. And it is only to such a character. When Atlantic's motion to dismiss was successful, it was a judicial determination that Lawhorn had no claim upon which relief could be granted. If there was no claim, no counterclaim was required.' Id. at 356. (emphasis in original)

The plaintiff in this suit is not precluded from asserting her claim for refund because of the prior tax court decision. When the government's claim died of old age, the taxpayer was freed of the requirement that she file all related claims at that time. The tax court acquired jurisdiction only to the extent of dismissing the government's claim. Furthermore, it is entirely inequitable to force a taxpayer from a forum she has chosen into another on the basis of an invalid government claim and then, when the government's case has been

dismissed, tell her that she has lost all rights she may have had. This result is surely not consistent with the policy behind the compulsory counterclaim type rule which was designed to reduce multiplicity of lawsuits.[6] It was not designed to produce unjust or harsh results.

IV.
IRC SECTION 165

IRC Section 165(a) provides for a deduction of losses sustained during a taxable year. Section 165(c)(3) allows for losses not connected with a trade or business that arise from theft. Section 165(e) states that:

> 'Theft Losses.--For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.'

Plaintiff contends that through the misrepresentations of her employer, attorney, and boyfriend there was a theft of her property. The property was valued in excess of $400,000. She claims a theft loss deduction for the taxable year 1965. If she is entitled to this deduction, she would receive a sizeable refund from the government.

Plaintiff is a 44 year old woman with a seventh grade education. At age 14, plaintiff was married to her first husband. At age 15, she had her first child.

In 1963 they lived in Syracuse, New York, where plaintiff worked as a salesgirl in a department store. It was in

Syracuse that plaintiff met and became friends with a wealthy older man. He provided her with a very nice apartment and valuable gifts, including Xerox Corporation stock. The total value of these gifts was in excess of one million dollars.

In 1963 plaintiff moved to New York to take a job as a model. Eventually she was employed as a hatcheck girl and singer at a nightclub, which was owned by Mathew Ianniello and managed by his brother Alfred.

Plaintiff began dating Alfred Ianniello, and the Ianniello brothers learned of the substantial gifts which had been bestowed on the plaintiff. Up to this point the facts are relatively undisputed.

Plaintiff claims that the Ianniello brothers were heavily involved in organized crime. She contends that the brothers, along with their attorney, proceeded to swindle her out of her money through the use of trickery, fraud, and deception in the year 1965. The government denies that these funds were so taken and asserts that if they were, plaintiff was not fully cognizant of the loss until after the 1965 tax year. To sustain her claim of Section 165 loss for 1965, plaintiff must prove that there was a theft within the meaning of New York law[7] and that she discovered the theft within the taxable year.[8] Under New York law, 'theft' includes obtaining property by false pretenses. The pertinent portions of that law state as follows:

> 'Larceny; defined
>
> * * *
>
> '2. Larceny includes a wrongful taking, obtaining or withholding

> of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:
>
> '(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;
>
> * * *
>
> '(d) By false promise.
>
> 'A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.''
>
> McKinney's N.Y. Penal Law, § 155.05

I am satisfied that there was a theft within the meaning of New York law and that the plaintiff discovered the loss within 1965. I find plaintiff's testimony entirely credible. I have no problem finding for the plaintiff. The plaintiff's almost unrefuted testimony was that the Ianniello brothers and their attorney convinced the plaintiff she should sell

almost all her stock in one lump, incurring tremendous capital gains tax obligations. The Ianniellos then convinced the plaintiff--a financially unsophisticated person--to put much of her cash into proposed investments which were nothing more than schemes to defraud plaintiff. Plaintiff lost more than $300,800 in this manner. This amount is more than necessary for plaintiff to recover her claimed refund. Plaintiff is entitled to $64,600.95[9] plus interest from April 15, 1966.

This Opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

1. See I.R.C. 165, 'Losses'.

2. Section 7422(e) reads in its entirety:

'(e) Stay of Proceedings.--If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, gift tax, or tax imposed by Chapter 42 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not

file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).'

3. See U.S. v. Joe Graham No. 119, American Legion, 340 F.2d 474 (5th Cir. 1965), and Kisting v. Sauber, 325 F.2d 316 (7th Cir. 1963). The Senate Report involving this subsection states:

'Subsection (e) of this section is a new provision to cover the situation where there is concurrent jurisdiction in the district court (or Court of Claims) and in the Tax Court over the same case. This may arise, for example, where the taxpayer files suit for refund in the district court and, while the suit is pending, a notice of deficiency is issued and he appeals that notice to the Tax Court. Under subsection (e), if the notice of deficiency is issued before the case is heard in the

district court (or Court of Claims), the proceeding must be stayed for the 90-day period of the notice and for 60 days thereafter. If the taxpayer appeals to the Tax Court then on such counterclaim or intervention the taxpayer will have the same burden of proof as he would bear if he had appealed the case to the Tax Court.

The result under subsection (e) is to give jurisdiction over the cause of action to only 1 court (2 courts may acquire jurisdiction under existing law), and to give the taxpayer the choice of which court shall have jurisdiction. The taxpayer, by filing a petition in the Tax Court, would cause that court to have sole jurisdiction, or, by failing to file a petition in the Tax Court, would cause the district court or the Court of Claims to have sole jurisdiction.' 3 U.S. Code, Cong. & Admin. News (1954) 4621, 5261.

4. Before I reject the government's position on this point, I should point out in all fairness to the government that there are cases which contain language in support of its position. The language, however, in all cases has been dictum. See, for example, U.S. v. Wolf, 238 F.2d 447, 449 (9th Cir. 1956).

5. Fed. R. Civ. P. 13(a) states in relevant part:

'A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties

of whom the court cannot acquire jurisdiction.'

6. Since the government's case was time barred, it is not less efficient to let the plaintiff bring her claim here or wherever she desires.

7. The law of the jurisdiction where the loss is sustained is applicable in determining a theft loss within the meaning of Section 165(c)(3) and (e). Edwards v. Bromberg, 232 F.2d 107 (5th Cir. 1956); Montelone v. Commissioner, 34 T.C. 688 (1960); Bellis v. Commissioner, No.74-1877 (9th Cir. July 26, 1976).

8. See Section 1.165-1(d)(2)(i) of the Treasury Regulations.

9. The plaintiff's claimed amount of $65,418.80 has been reduced by an $817.85 amount already credited for the 1965 taxable year.

Appendix, dated October 5, 1976

APPENDIX

Pursuant to a stipulation between the parties, all exhibits were allowed into evidence subject to their counsels' respective objections. The defendant objects to plaintiff's exhibits 13-16. Objection is sustained. Defendant also objects to paragraphs 4-9 of the summary of the anticipated testimony of Paul G. Mahon. The objections are sustained except as to paragraph 8.

After trial the plaintiff made a general objection to each of the defendant's

exhibits. Several weeks later more detailed objections were delivered to the court. After having considered these, I have determined that plainitff's objections should be denied and defendant's exhibits admitted."

APPENDIX C

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUN 18 1979
ROBERT M. CHRIST, CLERK
BY DEPUTY

DOLORES J. RUSSELL,
Plaintiff-Appellee

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant

No. 77-1136
DC Cv73-74 ORS

APPEAL from the United States District Court for the
District of Oregon

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED with directions to vacate the judgment and dismiss the action.

Costs in this court in favor of the Appellant and against the Appellee.

Costs:

BRIEF FOR THE APPELLANT	$100.72
TOTAL	$100.72

A TRUE COPY
ATTEST
15 JUN 1979
EMIL E. MELFI, JR.
Clerk of Court
by
Deputy Clerk

Filed and entered March 9, 1979

APPENDIX D

RECEIVED
JUN 5 1979

FILED
JUN 1 1979
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DELORES J. RUSSELL,

Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

No. 77-1136

ORDER

Before: DUNIWAY and CHOY, Circuit Judges, and GRANT,* District Judge

The petition for a rehearing is denied. The suggestion of a rehearing in banc has been transmitted by the Clerk to all of the active judges of the court and no judge has asked for a vote on the suggestion of a rehearing in banc. The suggestion of a rehearing in banc is rejected.

*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

APPENDIX E

26 U.S.C.§7422, CIVIL ACTIONS FOR REFUND

* * *

(e) Stay of proceedings.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

PROOF OF SERVICE

I, FERRIS F. BOOTHE, one of the attorneys for DOLORES RUSSELL, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of August, 1979, I served copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit, on the United States, by leaving a copy thereof at the office of the United States Attorney for the District of Oregon, SIDNEY LEZAK, Esq., U.S. Courthouse, 620 S.W. Main Street, Portland, Oregon, 97205; by mailing three copies in a duly addressed envelope with postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C., 20530; and, by mailing four copies in a duly addressed envelope with postage prepaid , to the following

PROOF OF SERVICE - continued

individuals - MYRON C. BAUM, Acting Assistant Attorney General, GILBERT E. ANDREWS, LEONARD J. HENZKE, JR., and JANE M. EDMISTEN, Attorneys, Tax Division, Department of Justice, Washington, D.C., 20530

DATED this _____ day of August, 1979.

BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS

_____
FERRIS F. BOOTHE
of Attorneys for Petitioner

Supreme Court, U.S.
FILED
OCT 10 1979
MICHAEL RODAK, JR., CLERK

No. 79-298

In the Supreme Court of the United States

OCTOBER TERM, 1979

DELORES J. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-298

DELORES J. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether the decision below correctly rejected petitioner's attempt to split her single cause of action with respect to her 1965 income tax liability by successfully litigating a $50,000 net proposed deficiency for that year in the Tax Court and then litigating an alleged $65,000 overpayment for the same year in a district court refund suit.

The facts are undisputed and may be summarized as follows: In October 1966, petitioner filed her 1965 tax return and paid approximately $65,000 in income taxes for capital gains realized in that year. The Internal Revenue Service lost this tax return (I-R. 17-19).[1] In 1969,

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[1] "I-R." and "II-R." refer to the duplicated record in the court of appeals.

petitioner filed a second tax return reflecting such payment, together with a claim for refund of the entire payment on the basis of a previously unclaimed theft loss deduction (Pet. App. 28; I-R. 17-18). In February 1973, petitioner instituted this refund suit for the $65,000 in the United States District Court for the District of Oregon (Pet. App. 28). In July 1973, however, petitioner also filed a petition in the Tax Court seeking a redetermination of a net deficiency of approximately $50,000 for 1965[2] (Pet. App. 29; I-R. 18). In October 1973, petitioner dismissed her refund suit without prejudice (I-R. 6, 11).

The government subsequently discovered evidence of petitioner's filing of her first return in 1966 (I-R. 19). Petitioner thereafter moved the Tax Court to dismiss her petition without prejudice, on the ground that the $50,000 deficiency was barred by the statute of limitations (I-R. 27-31). The government objected on the grounds that the statute of limitations was not a jurisdictional defense, and that the entire 1965 income tax liability—including the alleged $65,000 overpayment—was properly before the Tax Court (I-R. 36-46). In May 1974, the Tax Court denied petitioner's motion to dismiss her petition without prejudice (I-R. 20). In June 1974, the Tax Court entered a decision that there was no deficiency. In so ruling, the court did not refer to the $65,000 alleged overpayment (I-R. 47).

In the interim, petitioner and the government stipulated to reinstatement of her district court refund suit for the alleged $65,000 overpayment, subject to the government's objection that the district court lacked jurisdiction under

[2]The total proposed deficiency was $115, 925.69 against which was credited petitioner's payment of $65,492.50 (I-R. 26).

Section 7422(e) of the Internal Revenue Code of 1954 (26 U.S.C.) (I-R. 11, 48).[3] The district court held that petitioner was entitled to a theft loss deduction for that year and upheld the refund (Pet. App. 45). The court of appeals reversed. It ruled that the Tax Court had jurisdiction to adjudicate petitioner's claimed $65,000 overpayment under Section 6512(b) and that the district court was thereby barred by *res judicata* from adjudicating the same overpayment under Section 7422(e) (Pet. App. 30-31).[4]

1. The court of appeals correctly held (Pet. App. 30-31) that Section 7422(e) deprived the district court of jurisdiction over her refund suit for 1965 because the Tax Court entered a decision with respect to a deficiency for the same taxable year. Section 7422(e) provides that "[i]f the taxpayer files a petition with the Tax Court, the district court * * * shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund." Here, the district court lost jurisdiction, because Section 6512(b) of the Code gave the Tax Court jurisdiction of both the deficiency and overpayment portions of the theft loss "subject matter" underlying the Tax Court petition.

Petitioner argues (Pet. 19-26) that requiring her to pay the full 1965 tax before litigating in the district court is unfair, in view of the government's loss of her first 1965 return. But even if the first 1965 return had not been lost, petitioner would still have been required to pay the full

[3]Contrary to petitioner's assertion (Pet. 4), the government stipulated to reinstatement of the district court suit subject to its jurisdictional objections (I-R. 11), and then promptly filed a motion to dismiss for lack of jurisdiction (I-R. 48-70).

[4]The court of appeals did not reach the merits of petitioner's claim to a theft loss deduction (Pet. App. 33).

$116,000 tax before suing in the district court. At all events, since petitioner could have litigated the full $116,000 amount in the Tax Court, the availability of that remedy refutes her charge that the decision below unfairly required her to pay the full tax.

The legislative history of Section 7422(e) is in accord with this analysis. At the time of its enactment, the pertinent House Report, H.R. Rep. 1337, 83rd Cong., 2d Sess. A431-A432 (1954) (emphasis added), stated:

> Subsection (e) of this section is a new provision to cover the situation where there is concurrent jurisdiction in the district court (or Court of Claims) and in the Tax Court over the same case. This may arise, for example, where the taxpayer files suit for refund in the district court and, while the suit is pending, a notice of deficiency is issued and he appeals that notice to the Tax Court. * * * *If the taxpayer appeals to the Tax Court then the district court (or the Court of Claims) shall lose jurisdiction over the refund.*

See also S. Rep. No. 1622, 83d Cong., 2d Sess. 148, 610-611 (1954). Acco l: *Flora* v. *United States*, 362 U.S. 145, 166 (1960);[5] *Dorsey* v. *United States*, 211 Ct. Cl. 339

[5]Petitioner suggests that Section 7422(e) does not preclude the district court from adjudicating the same year's tax claim as was involved in the Tax Court proceeding, because the statute states that " 'the District Court * * * shall lose jurisdiction of taxpayer's suit *to whatever extent* jurisdiction is acquired by the Tax Court *of the subject matter* of taxpayer's suit for refund.' " (Pet. 14; emphasis in petition). But Congress used the words "to whatever extent" to make clear that when the district court suit involves different years and different issues, the district court is deprived of jurisdiction of only those years actually before the Tax Court. The words "subject matter" were used to ensure that if the Tax Court proceeding involves issues which are determinative of such issues in years before the

(1976); *United States* v. *Joe Graham Post No. 119, American Legion*, 340 F. 2d 474, 476-478 (5th Cir. 1965). The same rule has repeatedly been applied under Section 6512, which bars a refund suit brought after a Tax Court petition has been filed with respect to the same income tax year. *E.g.*, *United States* v. *Wolf*, 238 F. 2d 447, 449-450 (9th Cir. 1956); *Elbert* v. *Johnson*, 164 F. 2d 421, 424 (2d Cir. 1947); *Fiorentino* v. *United States*, 226 F. 2d 619 (3d Cir. 1955); *Dorl* v. *Commissioner*, 57 T.C. 720, 721-722 (1972). There is no reason why a different rule should apply here simply because petitioner commenced her refund suit before she filed her Tax Court petition.

In sum, once a claim or cause of action for the income tax liability of a particular year has been properly submitted to the jurisdiction of the Tax Court, the taxpayer is barred from obtaining an adjudication of that year's liability in any other court. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948).

2. Contrary to petitioner's argument (Pet. 6-7), the decision does not conflict with *United States* v. *Joe Graham Post No. 119, American Legion, supra*. There, the taxpayer first brought an income tax refund suit in the district court for its taxable year ended June 30, 1961. Subsequently, it filed a Tax Court petition covering the calendar years 1944 through 1960, urging that its tax should be computed on a fiscal year basis. The court of appeals held that the district court was deprived of jurisdiction of the fiscal year refund suit until the Tax Court decided whether a calendar or fiscal year tax period

district court—such as a loss carryback to an earlier year which is before the district court—the district court will stay its proceedings until the Tax Court decides the common issue and then apply the Tax Court holding. Neither of these two situations is involved in this case.

should be used. Only if the Tax Court decided that a fiscal year was correct and then dismissed the Tax Court petition for lack of jurisdiction, could the district court regain jurisdiction. The court, however, expressly recognized the principle inherent in Section 7422(e) as applied by the court of appeals here. Thus, the court stated (340 F. 2d at 476-477):

> The provisions of §7422(e) are designed to give the taxpayer an option, once he has received a ninety day deficiency notice from the Commissioner, to petition the Tax Court for a redetermination of the asserted deficiency or to refrain from filing such a petition and, having paid the alleged deficiency in full, proceed in the District Court on its suit for refund. He cannot do both because §7422(e) says that if the taxpayer files a petition with the Tax Court, the District Court "shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund."

Handshoe v. *Commissioner*, 252 F. 2d 328 (4th Cir. 1958), upon which petitioner relies (Pet. 7-12), is not to the contrary. There, the taxpayers appearing *pro se* instituted an income tax refund suit for 1954. Subsequently, they mistakenly filed a Tax Court petition for the same year "through inadvertence and ignorance of the law" (252 F. 2d at 329). The Tax Court denied taxpayers' motion to withdraw their petition without prejudice. While the court of appeals dismissed the appeal for lack of a final order, it suggested that the Tax Court should allow the requested withdrawal in order that the taxpayers could proceed with their refund suit. But *Handshoe* is of no assistance to petitioner in these refund suit proceedings. As the concurring opinion below

pointed out (Pet. App. 37), even on the assumption that the Tax Court erred in denying petitioner's motion to dismiss her petition, she should have appealed from that action; the district court in this refund suit has no jurisdiction to correct that claimed error.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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